



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 9, 2004

Ms. Kathleen Weisskopf
Assistant City Attorney
City of Arlington
P.O. Box 1065
Arlington, Texas 76004-1065

OR2004-5641

Dear Ms. Weisskopf:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 204101.

The Arlington Police Department (the "department") received a request for all documents, affidavits and reports dealing with the Internal Affairs ("IA") investigations numbered 04-006, 04-007, and 04-008. You claim that the requested information is excepted from disclosure under section 552.108 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Included among the documents you seek to withhold are arrest warrants and arrest warrant affidavits. Article 15.26 of the Code of Criminal Procedure states "[t]he arrest warrant, and any affidavit presented to the magistrate in support of the issuance of the warrant, is public information." Thus, you must release the arrest warrants and arrest warrant affidavits to the requestor.

You contend that the remaining information is excepted from disclosure under section 552.108. This section provides, in part:

- (a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:
 - (1) release of the information would interfere with the detection, investigation, or prosecution of crime[.]

....

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution[.]

Gov't Code § 552.108(a)(1), (b)(1). Generally, a governmental body claiming section 552.108(a)(1) or (b)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986).

You advise that criminal prosecutions to which IA investigations 04-007 and 04-008 pertain are pending in Tarrant County District Courts. Based on your representations and having reviewed the information at issue, we agree that release of IA investigations 04-007 and 04-008, inclusive of the videotape used in these investigations, would interfere with the detection, investigation, or prosecution of crime. Gov't Code § 552.108(a)(1). *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976).

However, section 552.108 is inapplicable to basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). We believe such basic information refers to the information held to be public in *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, with the exception of the basic front page offense and arrest information, as well as the previously addressed arrest warrants and arrest warrant affidavits, you may withhold IA investigations 04-007 and 04-008 from disclosure based on section 552.108(a)(1).

You also claim that IA investigation 04-006 is excepted from disclosure under section 552.108. We note, however, that section 552.108 is generally not applicable to the records of an internal investigation that is purely administrative in nature. *See Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (statutory predecessor not applicable to internal investigation that did not result in criminal investigation or prosecution); Open Records Decision No. 350 at 3-4 (1982). You state that IA investigation 04-006 is ongoing, and that as of the date the department received the request for information, the investigation lacked a completed IA report. You explain that "it is unknown whether there will be a determination as to criminal or administrative misconduct." Based upon your representations and our review of the submitted information, we understand that IA investigation 04-006 has not resulted in a criminal investigation or charge. We therefore conclude that the department may not withhold IA investigation 04-006 under section 552.108 of the Government Code.

However, within the documentation submitted as IA investigation 04-006 is information which is excepted under sections 552.101 and 552.117 of the Government Code.¹ Section 552.101 excepts from required public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This exception encompasses the common-law right to privacy. Information must be withheld from the public under section 552.101 in conjunction with common-law privacy when the information is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) of no legitimate public interest. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court applied the common-law right to privacy addressed in *Industrial Foundation* to an investigation of alleged sexual harassment. The investigation files at issue in *Ellen* contained third-party witness statements, an affidavit in which the individual accused of the misconduct responded to the allegations, and the conclusions of the board of inquiry that conducted the investigation. See 840 S.W.2d at 525. The court upheld the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the disclosure of such documents sufficiently served the public’s interest in the matter. *Id.* The court further held, however, that “the public does not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released.” *Id.*

Thus, if there is an adequate summary of an investigation of alleged sexual harassment, the investigation summary must be released under *Ellen*, but the identities of the victims and witnesses of the alleged sexual harassment must be redacted, and their detailed statements must be withheld from disclosure. See also Open Records Decision Nos. 393 (1983), 339 (1982). If no adequate summary of the investigation exists, then all of the information relating to the investigation ordinarily must be released, with the exception of information that would identify the victims and witnesses. In either case, the identity of the individual accused of sexual harassment is not protected from public disclosure. Common-law privacy does not protect information about a public employee’s alleged misconduct on the job or complaints made about a public employee’s job performance. See Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978).

In this instance, IA investigation 04-006 involves allegations of sexual harassment, as well as allegations of other misconduct. *Ellen* is, therefore, applicable to some of this information. As the information at issue includes an adequate summary of the sexual harassment investigation into the complaint filed January 26, 2004, the department must release the investigation summary, as well as the statement made by the individual under investigation in response to the alleged violations, redacting any information identifying victims or witnesses. We have marked this information accordingly. The department must

¹ The Office of the Attorney General will raise mandatory exceptions like sections 552.101 and 552.117 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

withhold the remaining information relating to this sexual harassment investigation from disclosure, including any detailed statements made by victims or witnesses, under section 552.101 in conjunction with common-law privacy under *Ellen*. As for documents unrelated to the January 26, 2004, sexual harassment complaint, we have marked the information that must be withheld under section 552.101 in conjunction with common-law privacy.

We note an additional instance within IA investigation 04-006 wherein common-law privacy rights may be implicated. Where an individual's criminal history information has been compiled by a governmental entity, the information takes on a character that implicates the individual's right to privacy. See *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). Therefore, to the extent that IA investigation 04-006 contains an individual's criminal history compilation, such information must be withheld under section 552.101 and *Reporters Committee*.

Section 552.101 also incorporates section 1703.306 of the Occupations Code. Chapter 1703 of the Occupations Code codifies the Polygraph Examiners Act. See Occ. Code § 1703.001. See Occ. Code § 1703.001. Section 1703.306 provides as follows:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the person that requested the examination;
- (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;
- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

(b) The [Polygraph Examiners B]oard or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

(c) A polygraph examiner to whom information acquired from a polygraph examination is disclosed under Subsection (a)(4) may not disclose the information except as provided by this section.

Id. § 1703.306. We have marked polygraph information in IA investigation 04-006 that is confidential under section 1703.306. As there is no indication that this requestor has a right of access to this information, it must be withheld under section 552.101 of the Government Code.

We note that the department may also be required to withhold some of the remaining information, including the arrested individuals' social security numbers, pursuant to section 552.117 of the Government Code.² Section 552.117(a)(2) excepts from public disclosure a peace officer's home address, home telephone number, social security number, and information indicating whether the peace officer has family members regardless of whether the peace officer made an election under section 552.024 of the Government Code. Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. Section 552.117(a)(2) also applies to currently licensed peace officers formerly employed with the department.

However, for a formerly employed peace officer who is no longer a licensed peace officer, section 552.117(a)(1) excepts from disclosure the individual's home address and telephone number, social security number, and family member information if the individual timely requests that this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). Information that is responsive to a request may not be withheld from disclosure under section 552.117(a)(1) if the individual did not request confidentiality in accordance with section 552.024 or if the request for confidentiality under section 552.024 was not made until after the request for information at issue was received by the governmental body. Whether a particular piece of information is public must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Accordingly, we have marked the information that is within the scope of section 552.117: the department must withhold this information if either subsection (a)(1) or (a)(2) applies.

Even if section 552.117 does not except the arrested individuals' social security numbers from disclosure, they may also be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that the social security number in the file is confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes

² We note that section 552.108(c) generally requires the release of basic front page and arrest information, including the arrestee's social security number. However, information excepted from disclosure under section 552.117 must be withheld even if such information is basic front page and arrest information otherwise subject to section 552.108(c).

criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the department pursuant to any provision of law, enacted on or after October 1, 1990.

In summary, the department must withhold the marked information within IA investigation 04-006 under section 552.101 in conjunction with common-law privacy and section 1703.306 of the Occupations Code. To the extent that IA investigation 04-006 contains an individual's criminal history compilation, such information must be withheld under section 552.101 and *Reporters Committee*. With the exception of basic front page and arrest information, the department may withhold from disclosure IA investigations 04-007 and 04-008, as well as the videotape used in these investigations, under section 552.108(a)(1). The department must withhold the information we have marked under section 552.117 if either subsection (a)(1) or (a)(2) applies. Even if section 552.117 does not apply, the social security numbers may still be excepted under section 552.101 in conjunction with federal law. The department must release all remaining information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

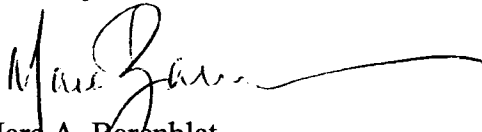
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in dark ink, appearing to read "Marc Barenblat", with a long horizontal flourish extending to the right.

Marc A. Barenblat
Assistant Attorney General
Open Records Division

MAB/sdk

Ref: ID# 204101

Enc. Submitted documents

c: Mr. Mark Agee
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(w/o enclosures)